

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on
the thirtieth day of November, in the year two thousand and nine:
present,

HON. MARGARET H. MARSHALL)	
)	
HON. RODERICK L. IRELAND)	
)	
HON. FRANCIS X. SPINA)	Justices
)	
HON. JUDITH A. COWIN)	
)	
HON. ROBERT J. CORDY)	
)	
HON. MARGOT BOTSFORD)	
)	
HON. RALPH D. GANTS)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby
amended as follows:

Rule 3:09, Canon 3:

By striking out Section 3B(9) and inserting
in lieu thereof the new Section 3B(9)
attached hereto.

The amendments accomplished by this order shall take effect on January 1, 2010.

<u>MARGARET H. MARSHALL</u>)	
)	
)	
<u>RODERICK L. IRELAND</u>)	
)	
)	
<u>FRANCIS X. SPINA</u>)	
)	Justices
)	
<u>JUDITH A. COWIN</u>)	
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<u>ROBERT J. CORDY</u>)	
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<u>MARGOT BOTSFORD</u>)	
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<u>RALPH D. GANTS</u>)	

Section 3B(9) of the Code of Judicial Conduct

(9) Except as otherwise provided in this section, a judge shall abstain from public comment about a pending or impending proceeding in any Massachusetts court, and shall require similar abstention on the part of court personnel.

(a) This section does not apply to any oral or written statement made by a judge in the course of his or her adjudicative duties.

(b) A judge is permitted to explain for public information the procedures of the court, general legal principles, or what may be learned from the public record in a case.

(c) A judge is permitted to speak, write, or teach about cases and issues pending in appellate courts when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals and bar publications. This educational exemption does not apply, however, to comments or discussions that might interfere with a fair hearing of the case.

(d) A judge is permitted to make public comment concerning his or her conduct provided that such comments do not reasonably call into question the judge's impartiality and do not address the merits of any pending or impending judicial decision.

(e) This section does not apply to proceedings in which a judge is a litigant in a personal capacity.

Commentary to Section 3B(9)

The section's restrictions on judicial speech are essential to the maintenance of the independence, impartiality, and integrity of the judiciary.

For purposes of this section, public comment is any oral or written statement about a case made by a judge other than statements made in the course of the judge's adjudicative duties. The requirement that a judge abstain from public comment regarding a pending proceeding continues during any appellate process and until final disposition. A case is impending for purposes of this section if it seems probable that a case will be filed, if charges are being investigated, or if someone has been arrested although not yet charged. This rule does not require a judge to abstain from public comment about a proceeding in a Massachusetts court that is not pending or impending.

"Any Massachusetts court" for purposes of this section means any state or federal court within the Commonwealth of Massachusetts.

Consistent with section (a), a judge may speak or write about a pending or impending case in the course of his or her adjudicative duties. A judge's oral statements from the bench during court proceedings and written orders or memoranda of decision filed in the case are made "in the course of his or her adjudicative duties."¹ Judges are encouraged to explain the basis for their decisions on the record. In some instances, such as decisions regarding bail, the use of prepared forms which become part of the public record may assist judges in this task. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings.

Section (b) permits the dissemination of public information to educate and inform the public, while assuring the public that cases are tried only in the judicial forum devoted to that purpose. A judge may explain to the media or general public the procedures of the court and general legal principles; for example, the procedures and standards governing a "dangerousness hearing" under G. L. c. 276, § 58A or restraining orders under G. L. c. 209A. A judge may also explain to the media or the general public what may be learned from the public record in a particular case. For example, a judge may respond to questions from a reporter about a judicial action that was taken and may correct an incorrect or incomplete media report by referring to matters that may be learned from the pleadings, documentary evidence, and proceedings held in open court. Section (b) permits similar responsive comments or explanations by a judge acting in accordance with administrative duties, including statements made by a judge who serves as part of a court department's judicial response team.

When speaking, writing, or teaching about cases or issues, as permitted under Section (c), a judge must take care that his or her comments do not impair public confidence in the impartiality of the judiciary.

"Conduct" as used in subsection (d) refers to the manner in which a judge behaves and not the substance of a judge's rulings. For example, an allegation that the judge consistently fails to work a full day is an example of conduct contemplated by subsection (d).

Speaking to a journalist is a public comment even where it is agreed that the comments are "off the record."

The authorization to comment is permissive; there is no requirement that a judge respond to statements in the media or elsewhere. Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond.

¹ For guidance as to a memorandum issued by a judge that provides or supplements an earlier order (an explanatory memorandum), see Supreme Judicial Court Guidance Regarding the Issuance of Explanatory Memoranda contained in Appendix A.

APPENDIX A

SUPREME JUDICIAL COURT GUIDANCE REGARDING THE ISSUANCE OF EXPLANATORY MEMORANDA

We have carefully considered whether Section 3 B(9) of our Code of Judicial Conduct should apply to a memorandum issued by a judge that provides or supplements the reasons in support of an earlier order (an explanatory memorandum). We have determined that, in all but the most unusual circumstances, the decision whether to issue an explanatory memorandum is left to the sound judgment of the individual judge and is not an appropriate ground for judicial discipline under Section 3 B (9). We provide guidance here to assist a judge in exercising that sound judgment.

We encourage judges to explain the basis for their decisions on the record at the time the decisions are made, including decisions concerning bail and sentencing. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings. In some instances, such as decisions regarding bail, where the volume of matters may make it difficult always to articulate detailed findings, judges should set forth their reasons on forms prepared for this purpose. When a judge orally renders a decision and intends to explain his or her reasons in a written memorandum of law, the judge should inform the parties that an explanatory memorandum will be forthcoming.

When the judge has not indicated at the time he or she issues the underlying order that a written explanatory memorandum will be forthcoming, and such a memorandum has not been requested by a party or by an appellate single justice or court, a judge should issue an explanatory memorandum only after careful consideration, weighing, at a minimum, the following factors:

- the importance of avoiding or alleviating the parties' or the public's misunderstanding or confusion by supplementing the record to reflect in more detail the reasons in support of the judge's earlier decision;
- the amount of time that has elapsed since the order was issued and the extent to which the judge's reasons for the decision remain fresh in his or her mind;
- the risk that an explanatory memorandum may unfairly affect the rights of a party or appellate review of the underlying order; and

- the danger that the issuance of an explanatory memorandum would suggest that judicial decisions are influenced by public opinion or criticism voiced by third parties, and would not promote confidence in the courts and in the independence and impartiality of judges.

An explanatory memorandum is appropriate only if issued within a reasonable time of the underlying order and if the judge clearly recalls his or her reasons for the decision. An explanatory memorandum should not be issued solely to respond to public criticism of the decision, and should not rely on any information that was not within the record before the judge at the time of the underlying order.

A judge may not issue an explanatory memorandum if the court no longer has authority to alter or amend the underlying order. By way of example, a judge may not issue an explanatory memorandum when:

- the underlying order is the subject of an interlocutory appeal, report, or other appellate proceeding that has already been docketed in the appellate court, unless such a memorandum has been requested by an appellate single justice or court;
- the case has been finally adjudicated in the trial court, no timely-filed postjudgment motions are pending, and the time within which the court may modify its orders and judgments on its own initiative has passed;
- in cases where an appeal has been taken from a final order or judgment, the appeal has been docketed in the appellate court.